IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 13TH AUGUST 2007 / 22ND SRAVANA 1929

CRL.A.No. 785 OF 2004(A)

SC.286/2003 OF THE ADDL. SESSIONS COURT, (FTC-I), MANJERI.

APPELLANT/ACCUSED:

KUTTIPALAN, CONVICT NO.513,
CENTRAL PRISON, KANNUR.

BY ADV. SRI.PROMY KAPRAKKATT
SRI.NICHOLAS JOSEPH

RESPONDENT/ COMPLAINANT:

STATE OF KERALA, REP.BY A PUBLIC
PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI. C.M. KAMMAPPU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R. RAMAN & K. HEMA, JJ.

CRL. APPEAL NO. 785 OF 2004

DATED THIS, THE 13TH DAY OF AUGUST, 2007.

J U D G M E N T

Hema, J.

The appellant was convicted and sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs. 2,500/- and in default to undergo imprisonment for two years under Section 302 of the Indian Penal Code (for short, 'the I.P.C.') by the Additional Sessions Judge. The said conviction and sentence are challenged in this appeal.

2. According to the prosecution, on 14.11.2001 the accused and deceased Mundichi, who were husband and wife, were proceeding to their house after the work. Both of them were fully drunk and on the way, they picked up some quarrel as usual and infuriated by this, the accused strangulated Mundichi, using M.O.1 lunki worn by her and committed murder. The accused absconded for a few days and on 20.11.2001, he was chased by local people, he fell down in a well and on information, the police came there and took him into custody and kept him under surveillance. On the next day, ie. on 21.11.2001, at 8.30 AM, he was arrested at Nilambur Police Station, by PW.10. Pursuant to a statement

given by him, which is recorded in Ext. P4 mahazar, M.O.1 Lunki which was used as ligature was recovered, as pointed out by the accused. PW.3, who is the mother of Mundichi, gave the First Information to the police and a crime was registered. The prosecution case is that the incident happened on the pathway lying south-east in the property of one Mohammed, at Muttiyal, Adiyampara. The investigation commenced and after investigation, a charge sheet was laid against the accused for offence under Section 302 I.P.C.

3. The prosecution examined PWs 1 to 13, marked Exts.P1 to P17 and M.Os. 1 and 2 on its side. The accused did not adduce any evidence; but pleaded innocence. He has stated that he had not committed murder of his wife. On an analysis of the evidence in detail and the rival contentions, the lower court came to the conclusion that the recovery effected under Section 27 of the Evidence Act would necessarily incriminate the accused. The court relied upon the fact that the deceased was last seen alive in the company of the accused. The lower court held that the prosecution succeeded in establishing the guilt of the accused beyond reasonable doubt and convicted the accused under Section 302 I.P.C.

4. As per the prosecution case, the deceased was murdered by the accused by strangulating the deceased using M.O.1 lunki which was worn

by her at the time of occurrence as a ligature and caused her death. On the basis of the evidence of PW.13 and Ext.P17 post mortem certificate, the court below entered a finding that the death was caused due to ligature strangulation. PW.13 deposed that autopsy on the body of the deceased was conducted by him and he issued Ext.P17 the post mortem certificate, noting down the antemortem injuries found on the body. There were as many as six injuries including contusion, multiple abrasions, contused abrasions and also a pressure abrasion on the neck. The doctor said in the chief examination that the cause of death is due to ligature strangulation as seen from the nature of Injury No.1, which is a the pressure abrasion on the neck.

5. PW.13 deposed that in the case of ligature strangulation, ligature mark will be present and well-defined, depending upon the material used. But, PW.13 admitted that ligature pattern was absent in this case and Injury No.1 is only a pressure abrasion, without anything further to indicate that this was a case of ligature strangulation. In such circumstances, in the absence of any ligature pattern or mark on the neck, the case set up by the prosecution that the death was due to ligature strangulation cannot be said to be conclusively established.

6. In this context, it is relevant to note that the court itself framed a

charge wherein it is mentioned that the deceased was murdered by "throatling". It is not mentioned in the charge that the death was due to 'ligature strangulation' using any ligature. In such circumstances, the conclusion that can be arrived at is that the deceased died due to Injury No.1 which is pressure abrasion on the neck. There is no proof for the fact that any injury was caused by any ligature.

7. The definite case of the prosecution is that M.O.1 lunki was worn by the deceased at the time of occurrence and it was used by the accused for strangulating the deceased to death and it was concealed by the accused after the commission of offence and it was recovered later, pursuant to a disclosure statement. But, the evidence adduced in this case negatives possibility of the accused to remove the lunki - M.O.1 and conceal the same, as alleged. The evidence of PW.3 who is the mother of the deceased reveals that the lunki worn by the deceased was found around the waist of the deceased when she found her daughter lying dead. She also deposed that the face of the deceased was seen covered with the tip of the said lunki. This fact was stated in chief examination itself and also in cross examination. In the cross examination, it was clarified that the lunki was found worn around the waist, with the tip covering the face. This was the state in which the deceased was found by PW.3 the mother for the first time

on 15.11.2001 in the early morning before lodging the first information statement.

8. There is no reason to reject the evidence of PW.3. If the dead body of an adult woman, is found on a public place near a pathway, without being properly dressed, exposing the underskirt, this fact will not normally miss the notice of a mother. It would definitely be observed by a mother and it is unlikely that she would forget it also. In such circumstances, the evidence given by PW.3 that she found the lunki around the waist of the deceased, with the tip of it covering her face need not be doubted. Nothing is brought out in evidence to show that it could be a mistake. In such circumstances, it has to be concluded from the evidence of PW.3 that the deceased was wearing a lunki at the time when the dead body was found on 15.11.2001, much prior to the lodging of the First Information Statement.

9. Therefore, the case set up by the prosecution that the lunki allegedly worn by the deceased was recovered subsequently, as hidden by the accused, becomes doubtful. The alleged recovery of the lunki, M.O.1 at the instance of the accused loses all significance and it cannot be treated as an incriminating circumstance against the accused. It has also to be noted that M.O.1 lunki was not shown to any of the persons who saw the

deceased before her death and got it was identified as the lunki worn by her on the date of occurrence.

10. The lower court relied upon the contents of the inquest report to hold that no lunki was found on the dead body when the inquest was conducted. First of all, the court below committed an error in law by placing reliance upon the contents of the inquest report in the absence of any evidence of the officer who prepared it to show that he had recorded all the facts observed by him in the inquest report correctly and that there was no lunki on the dead body. The Inquest Report is not substantive evidence. PW9, the Sub Inspector of Police, who conducted inquest on the body of the deceased did not state that he had not seen any lunki on the dead body. So also, the attestor to the inquest report who was examined as PW.1 also did not say that at the time when inquest was conducted, there was no lunki on the dead body.

11. Therefore, in the absence of any cogent evidence to belie the evidence of PW3 regarding presence of lunki on the dead body, the evidence of PW.3 cannot be rejected. It has to be inferred that the deceased was found with the lunki around her waist after the death and prior to the lodging of the FIR and the evidence on the recovery of M.O.1 alleged to have been made by PW.10 pursuant to a disclosure statement

made by the accused to him as taken out by him under Ext.P4, cannot be acted upon as a piece of incriminating evidence against the accused.

12. The learned counsel appearing for the accused pointed out that the alleged disclosure statement given by the accused, even if accepted, does not incriminate him with the crime. It is seen from the alleged disclosure statement that he had not stated that he had kept M.O.1 "hidden". The information given by the accused to the police officer will not disclose that he is the author of concealment. What is disclosed is that a lunki was kept in between the rocks, but strictly speaking, it cannot be said that the said statement will lead to the conclusion that the accused himself is the author of concealment. At any rate, even if it is accepted that M.O.1 was taken out by him and produced before the police, it cannot be said that it was the ligature allegedly used by him for committing the offence, as alleged by the prosecution, especially in the absence of medical evidence indicating use of a ligature for strangulation.

13. The case of the prosecution is that the deceased gets easily offended while she is under intoxication and she picks up quarrel with the accused and other people. So, there was an altercation between the accused and the deceased as she was drunk on that day and she picked up quarrel as usual and abused the accused. Infuriated and motivated by this, he

allegedly committed murder of his wife. The question is whether the evidence of PW.1, PW.3 and PW.6 can be believed to hold that deceased Mundichi was drunk on that day so as to pick up a quarrel which was the basic reason for the offence. The only alleged cause for the murder is the intoxication of deceased Mundichi and the following quarrel. It has been brought out from the evidence of Pw.3 and PW.6 that once Mundichi was drunk, she would easily get irritated and quarrel with people. She is a quarrelsome person, if under intoxication.

14. The prosecution has a case that the deceased and the accused were fully drunk prior to the occurrence in the night of 14.11.2001. It was brought out from the evidence of PW.2, PW.3 and PW.6 that the accused and deceased were heavily drunk on 14.11.2001 in the evening. PW.3 the mother of deceased Mundichi asserted that the deceased had consumed arrack from the house of one "Thiyyan". PW.6 the brother of the deceased stated that all of them, including the deceased and the accused, went to "Sreeni" and had liquor from there and all of them were drunk in the evening of 14.11.2001. PW.2 stated that the deceased and accused were found fully drunk and they were not able to carry themselves properly, while walking.

15. Before acting upon the evidence of PW.2, 3 and 6 it is better

that it is tested as against the medical evidence adduced in this case. The evidence of PW.13 the doctor reveals that there was no smell of alcohol when he conducted postmortem examination on the body of the deceased. He specifically stated that he did not find possibility of the deceased consuming alcohol. He also stated that if the deceased had consumed alcohol, there would be smell of alcohol in the stomach and mouth. But there is absolutely nothing in Ext.P17 the post mortem certificate to show that there was any smell of alcohol either in the stomach or mouth. There is no reason to reject the expert evidence. Therefore, the evidence of PWs 2, 5 and 6 is belied by the medical evidence.

16. It is also relevant to note that the person who supplied liquor to the deceased and the accused was not examined in this case. The name of the person was mentioned in the evidence; but no investigation was conducted as to whether the deceased was drunk on that day as alleged. The examination of the person who supplied liquor will be material to prove the peculiar motive alleged in this case. But the lower court proceeded on the basis of the version given by the mother and brother of deceased and assumed that the deceased Mundichi might have got drunk on that day without their evidence being tested against the medical evidence and circumstances and hence the above finding cannot be sustained. Thus, the

fact that deceased Mundichi was drunk on the crucial evening and that there was possibility for her to pick up a quarrel which lead to the murder is not satisfactorily established.

17. The next circumstance which is sought to be proved in this case against the accused is the "last seen theory'. The fact that the deceased was last found alive in the company of the accused is projected as a circumstance to incriminate the accused. Before commenting upon the evidence, it has to be borne in mind that the accused and deceased were husband and wife and there is absolutely nothing unusual or unnatural for these two persons to be seen together, especially when they were going back as usual, after the work. As per the evidence of PW.3, the entire family was returning home after work, after purchasing articles etc. Therefore, the mere presence of the deceased with the accused by itself may not be incriminating. This is particularly so, since there is nothing in evidence to show that the accused and deceased were found quarreling with each other on any issue prior to the incident. Nobody has a case that even after consumption of liquor, they were quarreling on the crucial evening. In fact, the consumption of liquor itself is already held to be doubtful also.

18. Still the evidence of PW.2, 3 and 6, who are examined by the prosecution to prove the "last seen theory" can be looked into. None of the

witnesses gave evidence as to at what point of time the deceased and accused were found together last. One cannot expect illiterate persons like PW.3 and PW6 to speak the exact time but the prosecution ought to have taken effort to bring out the probable time when the deceased was last seen alive in the company of the accused. The time assumes importance, because as per the court charge, the offence was committed at about 7 P.M. on 14.11.2001. PW.2 only stated that the deceased and accused were seen in the "evening" of 14.11.2001. The evidence of PW.6 reveals that the deceased and accused were in the company of PW.6 and his wife in the "night" also. Therefore, the fact that PW.2 saw them in the evening loses significance and it will be of no use to the prosecution. PW.6 is the only person, as per the evidence adduced before the court, who had seen the deceased last alive with the accused in the night of 14.11.2001. He said that deceased and accused were watching Television when he parted them, and he reached his house at 8 P.M.

19. The distance from the place where the deceased and accused were standing, to the house of PW.6 is not in evidence. The probable time he will take to reach the house also is not known. Therefore, no positive conclusion can be arrived at on the basis of the evidence of Pw.6 that he saw the deceased and accused together before 7 p.m. on 14.11.2001. The

court cannot presume that it could be before 7 p.m. that he saw them. the lower court entered a finding that as per Pw.6's evidence he saw them at 8 p.m. If this finding is accepted, it is needless to say that the offence could not have been committed at 7 p.m. as stated in the court charge.

20. It is well settled that the time gap between the time at which the deceased and the accused were last found together and the time of death must be too small, so that there is no possibility for an interference from any other person. But in this case, the possibility of another person interfering and coming in between the deceased and the accused could not be ruled out by PW6 himself. He deposed in cross-examination that he cannot say that whether any other person had joined the deceased and the accused after he saw them together. A suggestion was made to PW6 that there was an altercation between deceased and Hamza who is the former husband of the deceased from whom she is separated and in the course of the quarrel he pushed the deceased and she happened to fall down and die by an accidental strangulation by stray creepers. PW6 could not deny the suggestion. He said, he did not know whether such incident had happened.

21. In this context, it is relevant to note that the prosecution has not adduced any evidence to prove the time of death. As per the charge sheet submitted by the police, the incident happened after 5 p.m on 14.11.2001.

The deceased and accused were found together on 14.11.2001 late in the evening. Still there is lack of evidence to when exactly the death took place. Nothing was brought out from the evidence of medical experts as to when the death could have taken place. In the absence of evidence relating to the time of death, the evidence let in to prove "last seen theory" is too weak a piece of evidence to be acted upon to enter a conviction against the accused. Even otherwise, the possibility of another person coming in between could not be ruled out even by the person who saw the deceased alive last in the company of the accused, in the late evening on 14.11.2001.

22. The next circumstance which is sought to be proved against the accused is that he was absconding, immediately after the incident. Though PW6 deposed that the deceased and the accused were found together on 14.11.2001, and it is in evidence that the deceased was found dead in the early morning on 15.11.2001, the accused was found missing. There is ample evidence to show that the accused had not gone to the house after the incident, but he was taken into custody only much later, on 20.11.2001. Therefore, this conduct of absconding is highlighted by the prosecution to establish the guilt of the accused.

23. Regarding abscondance, the accused has an explanation. It has been suggested in the cross-examination that Hamza, who is the former

husband of the deceased Mundichi had a role in the incident and he had threatened the accused and therefore, the accused had to hide himself out of fear. The accused came forward with a case that when the deceased and the accused were proceeding to their house, there was a quarrel between the deceased and Hamza on the way and the deceased was pushed by Hamza and she had a fall. During the fall, her neck got entangled in some stray creepers and she died. This story was not accepted by the court below. But the medical evidence does not rule out such a possibility.

24. PW13 the doctor categorically deposed in cross-examination that accidental strangulation can occur when the victim falls down from a higher level and the suggestion that there could be an accidental strangulation cannot be ruled out as a mere suggestion without any basis in the light of the evidence given by the doctor. He deposed that there could be such a possibility if the victim falls down and gets entangled by some cord. Of course, he also gave contradictory evidence in another context that such a strangulation cannot happen. But that statement of PW13 will not belie the earlier admission made by him of possibility of an accidental strangulation taking place in this case as suggested by the defence. It is relevant to note at this juncture that PW3, the mother of the deceased, gave evidence that the place where the dead body was found was very steep and she could not

reach the place going straight down from the pathway. Therefore, possibility of somebody pushing the deceased down and a strangulation taking place accidentally cannot be ruled out, while considering the nature of the place of occurrence as revealed from evidence.

25. According to prosecution, as per the evidence of the relatives of the deceased Hamza had no role in the incident. He would not have done it, as stated by PW3, the mother of the deceased. But curiously, as per the evidence of PW6, the brother of the deceased, Hamza is the person who had gone to the police station along with PW3, the mother and PW6 to give the first information statement. It has been brought out from the evidence of PW6 that they had gone together to the police station for giving first information statement. It is quite surprising that the mother and the brother of the deceased Mundichi had taken the aid of Hamza to go to the police station to lodge first information statement. The presence of Hamza with the relatives of the deceased while giving the first information statement raises a doubt whether Hamza had any interest in giving the first information statement in a particular manner.

26. There is no other reason why Hamza, the former husband of the deceased had accompanied the brother and mother of the deceased while they went to the police station to give the first information statement. As per

the evidence, Hamza was the former husband of the deceased and they had separated and thereafter she was living with the accused along with the daughter who is born to her in Hamza. It is not understood why such a person should have any interest in giving the complaint. This necessarily raises a doubt and it is difficult to ignore the allegation made by the accused against Hamza. In the absence of any explanation forthcoming for Hamza to accompany PW3 and PW6 to police station, the defence plea cannot be rejected as a mere cock and bull story. Taking this circumstance into consideration, the suggestion made by the accused that he was threatened by Hamza cannot be viewed lightly.

27. Even if the entire case regarding the abscondance is accepted, it is well settled that the mere abscondance cannot be taken as a ground to prove the guilt of the accused. On the facts and circumstances of this case, in the light of the shabby evidence relating to motive, last seen theory, recovery etc. no conviction is possible on the sole basis of the evidence relating to abscondance. Summing up the discussion, we hold that the prosecution has not proved the guilt of the accused. A person cannot be convicted on surmises or conjunctures or on strong suspicion. The circumstance under which the accused was taken into custody is also not proved by the satisfactory evidence. Only a police officer was examined to

state that the accused was taken into custody when he fell down in the well, when the people of the locality chased etc. But he had not seen the accused in the well and the prosecution has not examined any person who had chased the accused. Taking all the above circumstances into consideration, we find that the conviction and sentence passed against the appellant are unsustainable.

28. In the result, the conviction and sentence passed against the appellant for offence under Section 302 IPC are set aside. The accused is found not guilty of offence under Section 302 IPC and he is acquitted of the said offence. He is set at liberty forthwith. He shall be released from custody forthwith, if he is not required in any other case. The Registry shall issue release memo to the jail authorities concerned immediately.

Appeal is allowed.

P.R.RAMAN, JUDGE

K.HEMA, JUDGE

knc/vgs.

P.R.RAMAN & K.HEMA, JJ.

CRL.A.NO.785 OF 2004

JUDGMENT

13.8.2007